

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Kansas City Southern Railway Company

Dispute: Claim of Employees:

1. That Laborer N. J. Branch was unjustly dismissed from the service of the Kansas City Southern Railway Company on November 11, 1983.

2. That accordingly, the Kansas City Southern Railway Company compensate Laborer N. J. Branch at his pro rata rate of pay for each work day beginning November 12, 1983, until he is reinstated to service, and in addition to that received all benefits accruing to any other employee in active service, including vacation rights and seniority unimpaired. Claim is also made for Laborer N. J. Branch for his dependents and hospital benefits for himself, pension benefits including Railroad and Unemployment Insurance, and in addition to money claimed herein, the Carrier shall pay Mr. Branch an additional sum of 18% interest per annum compounded on the anniversary date of said Claim.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, Laborer N. J. Branch, has been employed by the Carrier, Kansas City Southern Railway Company, since July 12, 1973. On November 11, 1983, the Claimant was dismissed from service after a hearing and investigation into the Claimant's responsibility for the spillage of 4,000 gallons of diesel fuel, and a charge that he had violated General Rule Q, paragraph 1. The Organization filed a claim on the Claimant's behalf challenging his dismissal.

The Organization contends that the only rule violation charged to the Claimant was Rule Q, paragraph 1, which states:

"Employees must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tours of duty. They must not absent themselves from their employment, nor exchange duties with, or substitute others in their place, without proper authority. They must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer."

The Organization maintains that there is no indication in the record that the Claimant violated Rule Q, paragraph 1. In addition, the Carrier has not mentioned Rule Q subsequent to the investigation.

The Organization therefore maintains that the Claimant has been disciplined, although there has not been a rule violation. Numerous industry decisions have established that an Employee can be disciplined only for a charged rule violation.

The Organization also asserts that the Claimant did not receive instructions from his Foreman on how to perform the duties that led to the spill, although the Claimant requested instructions.

The Organization argues that the claim should be sustained, and the Claimant reinstated with back pay, all benefits and rights unimpaired, plus 18 percent interest per annum on the money award.

The Carrier contends that the Claimant was properly notified of the investigation and had sufficient information to prepare a defense; the Claimant was afforded all his rights.

The Carrier further contends that the Claimant admitted responsibility for the loss of over 4,000 gallons of fuel, and he failed to report the loss to anyone. The Carrier argues that said action by the Claimant constitutes a violation of Rule Q, and the Carrier had a right to discipline the Claimant.

Finally, the Carrier points to the previous discharge of the Claimant for sleeping on duty, where he was subsequently reinstated to service on a leniency basis. The Carrier therefore maintains that Management has the right to determine the measure of discipline to issue for flagrant rule violations. The Carrier contends that the discipline was not arbitrary or capricious, nor was it excessive due to the proven, serious rule violations and the Employee's previous record. The Carrier therefore contends that the claim should be denied.

This Board has reviewed the record in this case, and it is clear that the Claimant was guilty of violating Rule Q when he admittedly was negligently responsible for the loss of over 4,000 gallons of fuel and then failed to report the loss to anyone. That huge accidental loss of valuable property makes it evident that the Claimant was not devoting himself exclusively to his duties during his tour of duty after being properly instructed to pump fuel into the Carrier's storage tanks. Moreover, the failure of the Claimant to notify anyone of the fuel spillage is evidence of extremely sloppy performance on his part. Hence, we find that the Carrier had every right to take the disciplinary action against the Claimant.

Although this Board has held, on various occasions, that we will not substitute our judgment for that of the Carrier in the issuance of discipline, we have also held that we will not allow a Carrier's disciplinary action to stand if it is unreasonable, arbitrary, or capricious. In this case, the Claimant, although guilty of a serious infraction of negligence, was not willful in his inaction and was not shown to have been engaged in wrongful activity while the fuel spill was occurring. Consequently, based upon his ten years of service, this Board finds that it was unreasonable for the Carrier to discharge him. A lengthy suspension would have been a reasonable disciplinary action commensurate with the infraction and the Claimant's length of service.

This Board therefore orders that the Claimant be reinstated without back pay and that the period from November 11, 1983, be treated as a lengthy suspension.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1985.